



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO. 37 OF 2017

ALEX SHIUNZA OKUSIMBA.....APPELLANT

VERSUS

REPUBLIC.....STATE

(from the Original conviction and sentence by F.M. Nyakundi, R.M in Mumias SPM, CR. Case No. 991 of 2016 dated 21/3/2017)

J U D G M E N T

The appellant herein was convicted of the offence of burglary and stealing contrary to sections 304(2) and 279(b) of the Penal Code and sentenced to serve 6 years imprisonment on each limb. The appellant was aggrieved by the conviction and the sentence and filed this appeal.

The grounds of appeal are, inter alia that:-

- (1) The trial court erred in law and in fact by failing to find that P.W.1 did not prove ownership of the exhibited items.
- (2) The trial magistrate misdirected himself in law and in fact by holding the trial and recording the evidence of P.W.3, 4 and 5 in the absence of the appellant thereby infringing on the appellant's right to fair a trial as guaranteed under article 50 of the Constitution.
- (3) The trial magistrate grossly erred in law by presiding over the trial after the appellant had applied for his recusal from the case thereby occasioning serious prejudice.
- (4) The trial magistrate erred in law and in fact by convicting and sentencing the appellant in disregard to the right to self defence and mitigation.
- (5) The trial magistrate was biased against the appellant.

The particulars of the charge against the appellant were that on the night of 8th and 9th September 2016 at unknown time at Eshikumulo village, Eluche sub location in Mumias sub county within Kakamega County jointly with others not before court they broke and entered the dwelling house of Janet Alieli Waswani (herein referred to as the complainant) with intent to steal therein and did steal the following household goods - as per the list attached - all valued at Kshs.131,800.00 the property of Janet Alieli Waswani.

The case for the prosecution was that the complainant is a teacher at Mumias Central Primary School. She resides at Mumias but she has a home at Eluche. Livingstone Inanga P.W.2 is her herdsman at Eluche. That on the 8th September, 2016, the house of the complainant at Eluche was broken into and property stolen. The complainant received the report on the 9th September 2016. She reported at Mumias Police station. PC Munyao PW5 visited her house. He found the door to the house broken. The complainant confirmed that property had been stolen from the house.

Meanwhile on the morning of 9/9/2016 AP Corporal Ochayo P.W.3 and APC Omwima P.W.4 of Mayoni AP camp received information about a certain person who was transporting a luggage to Busia. The administration policemen went to the place notified of. They found the appellant and another person loading a bag into a vehicle. On seeing the policemen the other person ran away. The appellant was arrested. The luggage, a bag of clothes, was recovered. When arrested the appellant was wearing a track suit. He was taken to mumias police station. The complainant identified the goods recovered from the appellant as hers. She also identified the track suit the appellant was wearing as one belonging to her late husband.

Photographs of the scene and the stolen goods were taken. PC Munyao charged the appellant with offence. He denied the charge. During the hearing the complainant identified the recovered goods as hers and produced them as exhibits. The goods were released to her.

After the complainant P.W.1 and the complainant's day watchman P.W.2 had testified in the case, the appellant made an application for the trial magistrate to recuse himself from the case on the grounds that the magistrate had an interest in the case. The magistrate found no grounds to recuse himself. He ruled that he would proceed with the case. The appellant there upon declined to take part in the proceedings. The other witnesses P.W.3-5 were heard in the absence of the appellant. P.C. Munyao P.W.5 produced photographs of the broken doors of the house and photographs of stolen goods as exhibits. The trial court placed the appellant to his defence in his absence. The judgment, the conviction and sentence were delivered and imposed in his absence.

Findings of the trial court:

The trial magistrate found that the complainant's house had been broken. That the appellant was found with recently stolen goods and he did not give an account of how he came into their possession. That the presumption in the circumstances was that the appellant was the thief. He was convicted accordingly.

Submissions

The state opposed the appeal but did not make any submissions in the case.

The appellant made written submissions and submitted that there was no evidence that the house of the complainant was broken and property stolen. That photographs of the house said to have been broken were produced by the investigating officer P.W.5. That P.W.5 did not produce a certificate to show that he was appointed by the Director of Public Prosecutions as a scenes of crime officer and that he was competent to produce photographic evidence in court. That it was an error for the learned trial magistrate to place reliance on such inadmissible evidence and base conviction on it.

The appellant submitted that there was no evidence of identification that the alleged stolen goods belonged to the complainant. That the appellant was thereby convicted on mere allegations that the property belonged to the complainant.

He further contended that the matatu crew in whose vehicle he was alleged to have been loading the goods were not called to testify. There was no inventory signed by the appellant of the recovered goods.

The appellant submitted that the trial against him failed to meet the threshold of a fair hearing as set under article 50 of the constitution. That the trial court failed to provide him with copies of witness statements. That in hearing some witnesses in his absence, the trial court infringed on his rights of a fair trial.

Determination

The appellant was facing charges of burglary and stealing which offences are felonies. The trial magistrate heard the evidence of 3 witnesses in the absence of the appellant after the appellant refused to take part in the case upon the magistrate declining to recuse himself from the case. The appellant was accusing the trial magistrate of being biased against him.

The tenets of a fair trial are provided for under article 50 of the constitution.

Article 50(1) states that :

“ Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate , another independent and impartial tribunal or body”.

Article 50(2) (f) stipulates that:

“An accused person has the right to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.”

Article 25 states that the right to a trial shall not be limited.

Two witnesses had been heard in the case before the appellant asked the trial magistrate to recuse himself from the case. The grounds of recusal were captured in the court 's proceedings of 19/1/17 where the appellant said that :

“I am not ready . I have no faith with this court. I got arrested with you as you never came to my case. The complainant wants to jail me and the magistrate wants to jail me. I was forced to ask questions. My case never went the way I wanted as I have rights to be heard under the law. I want the case to go to another court.

The state responded that the allegation was absurd and that it was meant to delay the hearing of the case. The trial magistrate stated that he had no interest in the case and that there was no sufficient reason given for him to withdraw from the case. He directed for the case to proceed before him.

The circumstances in which a judicial officer can recuse himself/ herself from a case was stated by the court of Appeal in **Philip K. Tunoi & Another Vs Judicial Service Commission & Another (2016) eKLR** where the court cited the English case of **Porter Vs Magill (2002) IAIER 465** where the House of Lords held that:

“The question is whether the fair minded and informed observer , having considered the facts , would conclude that there was a real possibility that the tribunal was biased.”

The court also cited with approval the decision in **Tumaini Vs Republic (1972) EALR 441** where it was held that in considering the possibility of bias , it is not the mind of the judge which is considered but the impression given to reasonable people.

Where a party is making allegations of bias by a judicial officer, the facts constituting the bias must be specifically stated and established . In the case in the lower court the appellant did not state clearly why he thought the magistrate was biased against him. He did not bring out reasons as to why he thought the magistrate wanted to jail him. There was something about asking questions but it was not clear what the issue was about. I would therefore say that the appellant did not establish that there was a real possibility that the trial magistrate was biased against him.

Be that as it may, the appellant was facing charges of felony. Section 99(1) of the Criminal procedure Code Provides that:

“ Subject to the following provisions of this section , whenever a magistrate issues a summons in respect of an offence other than a felony, he may if he sees reason to do so, and shall when the offence with which the accused is charged is punishable only by fine, or only by fine or imprisonment not exceeding three months , or by fine and such imprisonment , dispense with the personal attendance of the accused , if the accused pleads guilty in writing or appears by an advocate.

Section 206(1)of the Criminal Procedure Code provides that:

“ If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment , the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.”

The import of the above two provisions is that a person charged with a felony should not be tried in absentia. However there is a rider in Article 50(2) (f) of the constitution that a person so charged can be tried in absentia if his conduct makes it impossible for the trial to proceed.

In the case before the magistrate the appellant was asking that the case be referred to another court for hearing because the appellant perceived that the magistrate was biased against him. The reasons for the magistrate to withdraw himself from the case were not properly stated. The court has to note that the appellant was not represented by an advocate. The trial court does not seem to have properly recorded the reasons that were being advanced by the appellant. Some crucial issues may have been left out going by the manner in which the magistrate recorded the proceedings. Since the appellant was facing offences of felony, it was not proper for the trial magistrate to have proceeded with the case in the absence of the appellant. The appellant was simply requesting that the case be transferred to another court. He was not violent to the court. His conduct in absenting himself from the court was in protest of perceived bias by the magistrate.

In the foregoing the appellant was not afforded a fair hearing in the trial court conducting the case in his absence. The trial was thereby a nullity.

The question is whether I should order a retrial in the case. In **Mwangi vs Republic(1983) KLR 522** it was held that:

“ ... A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result”.

A retrial will only be ordered where the interests of justice so require and if it is unlikely to cause injustice to the appellant. In **Muiruri Vs Republic (2003) eKLR 552**, the Court of Appeal stated the following:-

“(1) Generally whether a re- trial should be entered or not must depend on the circumstances of the case.

(2) It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

In **Opicha Vs Republic (2016) eKLR**, the same court held that:-

“ Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a re-trial should be ordered, each case must depend on its particular facts and circumstances and an order for re-trial should only be made where the interests of justice require it.”

The evidence in the lower court was that the appellant was found with stolen property soon after the theft of the goods. The prosecution had in the circumstances a strong case against the appellant. The appellant is the one who refused to take part in the trial. He did not advance sufficient reasons for the trial magistrate to recuse himself from the case. The interests of justice demand that the case be handled to its logical conclusion. There is a possibility of a conviction in the case. I will therefore order for a re- trial.

In the premises the convictions are quashed and the sentences are set aside. I order for the appellant to be retried before another court of

competent jurisdiction other than one presided over by Hon. F.M. Nyakundi.

Delivered, dated and signed in open court at Kakamega this 18th day of September, 2018.

J.NJAGI

JUDGE

In the presence of

AppellantAppearing in person

Jumafor state

George.....Court Assistant

14 days right of appeal.